FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
FAX: 202-434-9949

June 13, 2008

MICHAEL A. FULMER	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. YORK 2007-52-D
v.	:	MORG CD 2007-01
	:	
METTIKI COAL CORPORATION,	:	Mettiki Mine
Respondent	:	Mine ID 18-00621

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a complaint of discrimination filed by Michael A. Fulmer ("Fulmer") pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(c)(3). Fulmer alleges that Mettiki Coal Corporation ("Mettiki") subjected him to adverse work assignments as a result of his election to receive protection from dusty work environments under 30 C.F.R. § 90.100 ("Part 90"). Mettiki moved for summary decision on several grounds. Mettiki's arguments were rejected, except for its charge that Fulmer's discrimination complaint was not timely filed with the Secretary. Fulmer was ordered to show justifiable circumstances for his late filing, and Mettiki responded. For the reasons that follow, I find that Fulmer has failed to establish justifiable circumstances for his failure to timely file his discrimination complaint, that Mettiki has suffered prejudice as a result, and that Mettiki is entitled to judgment as a matter of law.

Facts[1]

On August 25, 2003, after being placed on a production shift, Fulmer notified MSHA that he intended to exercise his right under Part 90 to work in area(s) of the mine that complied with Part 90 respirable dust limitations. MSHA notified Mettiki and, on October 8, 2003, Fulmer was reassigned to work as an outby foreman in areas of the mine where sampling established that respirable dust concentrations were in compliance with Part 90 requirements.

From October 8, 2003 to May 7, 2006, Fulmer's work shifts/assignments were continuously changed. In addition to his weekend outby shift, he worked production, longwall, conveyor belt and the return airways – areas where he believed that he was exposed to high levels of respirable dust. On May 8, 2006, Fulmer ceased working in the mine due to a decline in his

[1] The facts are considered in the light most favorable to Fulmer, the party opposing the motion. The statement of facts is based upon several submissions by Fulmer, chiefly the Affidavit of Michael A. Fulmer, dated February 14, 2008, and his December 26, 2007, response to the Show Cause Order directing him to show justifiable circumstances for the delay in filing.

health, and went on short-term disability. Fulmer did not return to work. In October 2006, he filed for Long Term Disability ("LTD"), which became effective on November 8, 2006, officially ending his employment with Mettiki Coal.

After he stopped working in May 2006, Fulmer phoned the local MSHA office and made an appointment to meet and "see if [he] had any remedy" for the way he had been treated. On July 3, 2006, he visited the MSHA field office in Oakland, Maryland, and met with inspector Phillip "Bud" Wilt. He explained what had happened, and that he "felt what [he] went through was discrimination." Wilt took a book out of his desk, and showed him that he could file a complaint of discrimination pursuant to section 105(c) of the Act. There was no discussion of a deadline for filing a complaint. Fulmer "decided to take time to think about his options," and did not file a complaint at that time. Had he been informed of the 60-day deadline, he would have filed a complaint immediately.

He subsequently decided to file a complaint, and made an appointment to meet with Wilt and his supervisor, Jerry Johnson, in September of 2006.[2] However, Wilt called and rescheduled the appointment, first to October, and then to November 7, 2006. At that time, Fulmer met with Wilt and Johnson and executed a discrimination complaint form. When Fulmer inquired when the investigation would start, Johnson requested that it be put off until after hunting season and the holidays, to which Fulmer agreed. On January 3, 2007, Fulmer again met with Wilt, who he understood had been assigned to investigate his complaint. He then signed another discrimination complaint form, reciting the same or similar facts as in the previous complaint. The November 2006 complaint apparently was not treated as officially filed by MSHA. The January 3, 2007, complaint was assigned "Case Number MORG-CD-2007-1."

By letter dated March 2, 2007, MSHA informed Fulmer that it found no violation of the Act and advised him of his right to file a complaint with the Commission pursuant to section 105(c)(3). Fulmer then filed the instant complaint.

Analysis

Commission Procedural Rule 67, 29 C.F.R. § 2700.67, provides that a motion for summary decision shall be granted only if the entire record shows that there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

---

[2] Fulmer has made inconsistent claims regarding the scheduling of the meeting. He asserted in his response to the Show Cause Order that it was initially scheduled for October 2006. He states in his February 14, 2008, Affidavit that the original appointment was in September 2006.

Section 105(c)(2) of the Act states that:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

The Commission has held that the 60 day time limit in section 105(c)(2) of the Act is not jurisdictional and that non-compliance may be excused on the basis of justifiable circumstances. *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21 (Jan. 1984); *Herman v. IMCO Serv.*, 4 FMSHRC 2135 (Dec. 1982). As the Commission stated in *Herman*, 4 FMSHRC at 2138-39:

> The placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by:
>
> > Preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witness have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.
>
> *Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1965), *quoting R.R. Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944).

The cases dealing with justification for delays in filing identify several factors that may be considered, and include but are not limited to, complainant's capacity or ability to initiate and pursue such a remedy,[3] complainant's awareness of his rights under the Act,[4] and, the length of the delay and whether it has resulted in prejudice to a respondent. If a respondent can demonstrate that critical evidence, e.g., a witness or document, is no longer available because of the delay, a complaint may be dismissed even if justifiable circumstances can be established.

---

[3] *Sinnott v. Jim Walter Res., Inc.*, 6 FMSHRC 2445 (Dec. 1994) (ALJ).

[4] *Sinnott; Hollis; Sec'y of Labor on behalf of Franco v. W.A. Morris Sand & Gravel, Inc.*, 18 FMSHRC 278 (Feb. 1996) (ALJ) (delay of 107 days justified by prompt filing after complainant first became aware of rights under the Act); *Sec'y of Labor on behalf of Smith v. Jim Walter Res., Inc.*, 21 FMSHRC 359 (Mar. 1999) (ALJ) (10 month delay excused by filing within 65 days of first learning of rights under section 105(c)); *Sec'y of Labor on behalf of Gay v. Ikerd-Bandy Co.*, 18 FMSHRC 341 (Mar. 1996) (ALJ) (3 month delay excused by filing 1 day after first learning of section 105(c) rights).

Prejudice is also inherent in any delay, because witnesses' recollections fade. *See Sinnott, supra* (delay of over 3 years "inherently prejudicial"). Consequently, the lengthier the delay, the stronger the justification required to overcome it. *See Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (June 1997) (ALJ) ("very special circumstances" required to justify delay of over 2 years). All such factors must be weighed to reach the ultimate determination of whether, on the facts of the particular case, the delay was justified. *Hollis, supra; Herman, supra.*

Justifiable Circumstances

The essence of Fulmer's complaint is that Mettiki retaliated against him because of his filing for Part 90 status, and that the discrimination began when Mettiki was notified of his Part 90 election on October 8, 2003, and continued until he went on short-term disability on May 8, 2006.[5] Accordingly, any actionable adverse actions would have occurred between those dates.

Under section 105(c)(2), Fulmer should have filed a complaint within 60 days of the first act of discrimination. Although he has not specifically itemized the dates upon which discriminatory work assignments were made, if the first one occurred on October 8, 2003, he should have filed a discrimination complaint on or before December 7, 2003. He also should have filed a discrimination complaint within 60 days of any subsequent discriminatory act. A complaint for discrimination occurring on May 8, 2006, when he stopped working for Mettiki, should have been filed on or before July 7, 2006. His November 7, 2006, complaint was submitted to MSHA almost three years after the first, and four months after the last, filing deadline.

His claim of justifiable circumstances is based, virtually exclusively, on a claimed lack of knowledge of his rights under the Act.[6] As he stated in his December 26, 2007, response to the

---

[5] Fulmer's allegations have been inconsistent. His November 7, 2006, MSHA complaint states that the discrimination started when he returned to work on March 10, 2003, after a period of short-term disability to receive treatment for a recurrence of cancer. Resp. Mot. Att. 9. His January 3, 2007, complaint states that the discrimination began after he opted for Part 90 status on August 25, 2003. Resp. Mot. Att 10. In an Affidavit, dated November 8, 2007, responding to Mettiki's motion, he asserted that his shifts were changed from October 8, 2003 to May 7, 2006.

[6] Fulmer does not claim any incapacity or inability to have timely filed a discrimination complaint. He worked for many years as a foreman, and exhibited an awareness and ability to pursue rights related to his employment. He was very knowledgeable about his rights under Part 90. He initially deferred his election of Part 90 status because he was able to change work assignments to an outby weekend shift job. When he was reassigned to a production shift, he promptly notified MSHA of his decision to seek Part 90 status, and successfully achieved that goal. He also has pursued a claim for black lung benefits, on which a hearing was scheduled for June 12, 2008, before a Department of Labor Administrative Law Judge. In conjunction with his

Show Cause Order directing him to show justifiable circumstances for his delay in filing, "To be truthful . . ., I did not know exactly what my rights were." His February 14, 2008, Affidavit, provided after he had obtained counsel, is more explicit. He disclaims knowledge that discrimination based upon Part 90 status was illegal, knowledge about the process for filing a complaint, knowledge of a filing deadline, and that he ever had "particular training or job assignment dealing with miners' rights."

As directed in the December 13, 2007, Show Cause Order, Fulmer must "establish justifiable circumstances for failing to file his MSHA discrimination complaint within 60 days of any alleged act of discrimination upon which he bases his claims." Fulmer was fully aware of his Part 90 rights, and understood at the time of each work assignment that he believed subjected him to excessive respirable dust that his rights had been violated. He claims that, had he known about his rights under section 105(c), he would have timely made a complaint to MSHA after each instance of discrimination.

His earlier statements, however, contradict that assertion. Documents attached to his response to a July 16, 2007, Show Cause Order demonstrate that he deliberately chose not to take any action to challenge what he believed were Mettiki's violations. A letter attached to his response states:[7]

> Due to my chemo/radiation treatments, I had to miss a lot of work and each time my cancer returned I had to miss even more. I felt I owed that company, so I did not complain the way I should have.
> . . .
> . . . I was a supervisor for 25 years and I always said, "if you make waves, you will sink your own boat" and now I'm being told by your office because I didn't make them I still sunk my boat. Is that fair?

While Fulmer was most likely referring to his decisions not to complain to Mettiki or MSHA about violations of his Part 90 rights, it is clear that in addition to taking no steps to address those violations, he also made no attempt to determine whether he could pursue some other remedy, e.g., a complaint of discrimination, a right that he should have been aware of.

---

securing disability benefits from Mettiki, he has pursued a claim for Social Security disability benefits. It is apparent that Fulmer had the capacity to initiate a claim for discrimination throughout the pertinent time period.

[7] April 9, 2007, letter from Fulmer, in response to a March 2, 2007, letter from MSHA advising him that it did not find discrimination as alleged in his complaint. Copies of both letters were submitted in response to a July 16, 2007, Order to Show Cause.

Mettiki generally provided instruction on miners' rights in its annual refresher training sessions.[8] Fulmer attended those sessions every year from at least 1994, through 2006, with the exception of 2005. Instructions on miners' rights were definitely included in the sessions from 1996 through 2001, and most likely in other years. The training included references to an MSHA pamphlet entitled "A Guide to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977." The pamphlet was distributed at the training sessions or made available in the safety office. Pamphlet excerpts, including the 60-day filing time limit were presented as transparencies during the training sessions. The time limits related to claims of discrimination under section 105(c) of the Act are highlighted in the pamphlet.

It is clear that Fulmer should have been aware of his right to file a discrimination complaint with respect to the adverse action that he believed were taken because of his exercise of Mine Act rights. He had been specifically advised of his right to file a discrimination complaint, and the associated time limits for doing so, during annual refresher training sessions.[9] Materials explaining the process were readily at hand. He had many opportunities to speak to MSHA inspectors in private regarding actions he believed were unlawful.

In a similar case, a fellow Administrative Law Judge held that a miner asserting lack of knowledge of his Mine Act rights as justifiable circumstances for a delay in filing is under an obligation to make meaningful and good faith efforts to ascertain such rights. *Gross v. Leeco, Inc.*, 7 FMSHRC 219, 229 (Feb. 1985) (ALJ).

> Is a miner who believes he has been discriminated against entitled to remain in long-term ignorance of his rights and remedies because of inaction, lack of initiative, or reasonable good-faith effort? I conclude that in the situation such as that involved here, where a miner's filing delay is not occasioned by a specific justification such as – or similar to – those enumerated in the Act's legislative history, and is explained primarily by lack of knowledge of the rights provided for in the Act, there exists an obligation to make meaningful and good faith efforts to ascertain such rights. Such efforts should be of a nature to create a realistic opportunity for finding out one's rights, should commence within a reasonable time after the employer's alleged discriminatory action, and be continuing until the miner is informed one way or the other.

---

[8] Facts related to training on miners' rights are based on the March 28, 2008, Affidavit of Horace J. Theriot. Mettiki's Resp. to Comp. Supp. Brief. Ex. 1.

[9] While Fulmer asserts in his February 14, 2008, Affidavit, that he never had any "particular" training dealing with miners' rights, I do not find that assertion sufficient to create a genuine issue with respect to whether he received such training. Mettiki has provided records of training, signed by Fulmer.

While this decision is not binding precedent, I agree with the rationale, which is consistent with principles generally applicable in the context of equitable tolling of limitations periods.[10] This case does not involve a latent injury, or later-disclosed wrongful conduct. Fulmer was aware, at the time of each allegedly wrongful work assignment, that he was the victim of illegal conduct, and was concerned for his health because of his medical history. He knew that the assignments violated his rights under Part 90, and that he could have notified MSHA of those violations. He had ample opportunity to do so. He also should have been aware of his right to pursue a discrimination claim, including the 60-day time limit for filing a complaint. If he did not recall the specifics of his training, he could have easily obtained all of the pertinent information, the MSHA pamphlet was readily available and he had many opportunities to discuss his concerns with MSHA inspectors.

It was not until July 7, 2006, sixty days after he stopped working at Mettiki, that he took the step of bringing his concerns to MSHA, and was specifically advised that he could file a claim of discrimination under section 105(c)(2) of the Act. While he claims that he was not told, and had no knowledge, of the 60-day filing deadline, that information was also readily available. He stated that he was shown a book that stated that he could file a discrimination claim. In the Act, the 60-day time limit is contained in the same sentence that provides for the filing of a claim of discrimination. The limitation period is highlighted in the MSHA pamphlet. Any reasonable inquiry by Fulmer would have disclosed the limitations period. Neither party has cited precedent on the issue of whether lack of knowledge of the limitation period for the filing of a claim, as opposed to lack of knowledge of Mine Act rights, can toll the limitations period, i.e., amount to justifiable circumstances. Assuming that it could, I find that Fulmer should have known of the filing limitation well before he visited MSHA. In the exercise of due diligence, he should easily have been able to ascertain his rights under the Act, including the filing deadline, within weeks of August 23, 2003, when the allegedly adverse actions began. By January of 2004, at the latest, he is charged with knowledge of his Mine Act rights.

---

[10] *See, e.g., E.E.O.C. v. O'Grady*, 857 F.2d 383, 393-94 (7th Cir. 1988) (appropriate to toll limitations period applicable to Age Discrimination in Employment Act claim until reasonable plaintiff should have known of facts that would support charge of discrimination); *Demars v. General Dynamics Corp.*, 779 F.2d 95, 97, 99 (1st Cir. 1985) (six-month limitations period in National Labor Relations Act may be tolled for fraudulent concealment, if plaintiff fails to timely discover facts despite exercise of due diligence – summary judgment for defendant affirmed where plaintiff made no meaningful inquiry for nearly three years); *Price v. United States*, 775 F.2d 1491, 1494 (11th Cir. 1985) (cause of action under Federal Tort Claims Act accrues when plaintiff, in exercise of reasonable diligence, should be aware that injury is connected to some act of defendant); *Weger v. Shell Oil Co.*, 966 F.2d 216, 218 (7th Cir. 1992) (under Illinois law, limitations period tolled until plaintiff reasonably should know injury was wrongfully caused, burden then on plaintiff to inquire further as to existence of cause of action).

Prejudice

Mettiki claims that, because the mine closed in October 2006, it is "unlikely" that it will be able to locate witnesses and records necessary to rebut Fulmer's claims. It also asserts, in the Affidavit of Horace J. Theriot, its manager of human resources and safety, that it does not have records documenting precisely what area of the mine Fulmer was assigned to, or whom he worked with, during the time of the alleged discrimination. It does not assert that the unavailability of such records is attributable to any delay in the filing of Fulmer's discrimination complaint.[11] Undoubtedly, recollections about routine events such as work assignments and conditions will have faded. However, Mettiki has not shown concrete prejudice attributable to delays chargeable to Fulmer.

While Mettiki has not, at this time, demonstrated the kind of material prejudice that might defeat a showing of justifiable circumstances, the considerable delays chargeable to Fulmer would most likely result in prejudice due to faded recollections of events, such as Fulmer's work assignments and the conditions he was subjected to. Fulmer asserts, for example, that he was not the subject of any dust sampling during his allegedly discriminatory assignments. Consequently, in the absence of records quantifying respirable dust levels at such locations and times, available evidence as of November 2006, when Fulmer executed the first complaint form, would most likely have been limited to workers' recollections of events ranging from more than three years to six months in the past.

Conclusion

Fulmer alleges that he was subjected to discriminatory work assignments that were illegal, both under Part 90 and section 105(c) of the Act, beginning on October 8, 2003, and ending on May 8, 2006. He made an informed and considered decision not to complain or to ascertain the existence of any other remedy for actions which he knew at the time violated his Part 90 rights. He had received training on miners' rights under the Act and, with very little effort, could have ascertained that he could file a complaint of discrimination pursuant to section 105(c) of the Act. He waited for nearly three years after the first adverse action, and some sixty days after the last one, to inquire about his Mine Act rights. After being advised that he had a right to file a discrimination complaint, he continued to defer, considering his options, and allowed another 60 days to pass before a scheduled appointment with MSHA, ostensibly to file a

[11] Delays chargeable to Fulmer run from January 2004, when he should have been aware of his right to file a complaint, and from sixty days after any subsequent discriminatory work assignment, to November 7, 2006. While Mettiki apparently was not notified of Fulmer's complaint until sometime after January 3, 2007, it appears to accept that Fulmer cannot be charged with MSHA's failure to accept and act on the complaint he executed on November 7, 2006, assuming that it was tendered to MSHA at that time. *See Sec'y of Labor on behalf of Bennett v. Kaiser Aluminum and Chem. Corp.*, 3 FMSHRC 1539 (June 1981) (ALJ); *Franks v. Bowman Trans. Co.*, 495 F.2d 398, 404-05 (5th Cir.) *cert. den.* 419 U.S. 1050 (1974).

complaint. While, he could have walked in to any MSHA office and filed a claim at any time, he allowed another 60 days to go by while the appointment was rescheduled, and finally executed a complaint form on November 7, 2006.

Through the exercise of due diligence, he should have been aware of his Mine Act rights, including the filing limitations period, as of January 2004, at the latest. He chose to take no action. He has failed to establish justifiable circumstances for the late filing of his discrimination complaint. In addition, Mettiki has suffered some prejudice to its ability to defend, especially as to the older claims.

ORDER

Based upon the foregoing, I find that there exists no genuine issue as to any material fact, and that Mettiki Coal is entitled to judgment as a matter of law. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

Michael Fulmer, 2039 Maryland Highway, Mountain Lake Park, MD 21550

Timothy M. Biddle, Esq., Crowell & Moring LLP, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004-2595

Nathan J. Fetty, Esq., Appalachian Center for the Economy and the Environment, P.O. Box 2260, Buckhannon, WV 26201